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IN THE

Supreme Court Of The United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH SCHEIDLER, *et. al.*,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS, CENTER FOR LAW AND RELIGIOUS FREEDOM, AND J. SCOTT HOUSER, AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici Curiae share a common interest in the rights of free expression, including religiously-motivated expression, in areas of public concern, including (but not limited to) abortion. The Southern Center for Law & Ethics, a non-profit, publicly-funded tax exempt corporation, has previously submitted to this Court two *amicus curiae* briefs focusing on anti-

abortion civil disobedience. *See Amicus Curiae* briefs submitted in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993). The Center for Law and Religious Freedom, the legal advocacy and information arm of the Christian Legal Society, has advocated extensively in this and other courts for the protection of religious speech and exercise. J. Scott Houser is an ordained minister who has been subject to RICO litigation in large part due to religiously-motivated speech, and who has witnessed the chilling effect of RICO litigation upon others. These *amici curiae* are described more fully in the Appendix. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioners would have this Court use its authority to provide a legal mechanism to crush a social protest movement which continues to question the legitimacy of one of this Court's seminal decisions. If this Court were to permit the use of RICO against anti-abortion protesters, such holding necessarily would threaten other social protest movements, such as the environmental and animal rights movements, which also oppose the profit-making activities of particular industries. The structure of RICO's prohibitions makes it unlikely that such a threat to social protest movements was intended by Congress. The holding below should be upheld because the circuit court's interpretation of RICO avoids serious constitutional issues that would be raised if RICO were found applicable to social protest expression and activity not intended to obtain personal economic gain from the victim.

This Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), demonstrates that the First Amendment protects social protest movements and associations, even where such movements are marred by threatening speech and violent incidents. While the First Amendment does not protect actual violent acts against the person, the First Amendment necessarily limits which sorts of speech, association, and expressive conduct may be made illegal, and pro-

tects even threats of violence in the context of overcharged political rhetoric. *See also Brandenburg v. Ohio*, 395 U.S. 444 (1969). Thus, the First Amendment, in combination with the due process requirement of specificity, limits the kind of civil or criminal claims that can arise from social protest activities, associations, and writings. *See also Simon & Schuster v. New York Crime Victim's Board*, 112 S.Ct. 501 (1991).

There are presently adequate state and federal remedies for conspiracies and associations intended to accomplish acts of actual violence. *See, e.g.*, 18 U.S.C. §§ 2, 371, 844(i). If Congress wishes to widen the scope of liability for social protest movements, it should do so directly and with precision, and not in a way that passes responsibility to this Court to broadly construe and apply an existing statute addressing unrelated concerns.

ARGUMENT

The abortion-related context of the present case may distract the Court from the broader issues at stake. The present case involves the applicability of RICO to anti-abortion social activism. This Court is to some degree the source and target of such activism, having fueled the anti-abortion movement by its decision in *Roe v. Wade*, 410 U.S. 113 (1973). *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. Rev. 375, 376, 379-82 (1985).[1] More recently, this Court in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), relied upon the increasingly intense "pressure to overrule" *Roe* as a reason to affirm it, *see* 112 S.Ct. at 2816, and called upon the anti-abortion move-

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[1] "*Roe v. Wade*... has occasioned searing criticism of the Court, over a decade of demonstrations, a stream of vituperative mail addressed to Justice Blackmun ... annual proposals for overruling *Roe* by constitutional amendment, and a variety of measures in Congress and state legislatures to contain or curtail the decision. ... The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures." 63 N.C.L. Rev. at 379, 381 (footnote numbers omitted).

ment to cease its opposition to legalized abortion. See 112 S.Ct. at 2815 (*Roe* and *Casey* call for end of national division through acceptance of common mandate rooted in Constitution).

Petitioners would have this Court use its authority to provide a legal mechanism to crush a social protest movement which continues to question the legitimacy of one of this Court's seminal decisions. We propose tolerance here, not only for respondents, but also for the participants in other social protest movements.

I. This Court's Precedents Imply That Personal Economic Gain Arising From Racketeering Activity Is Needed To State A Claim Under RICO's Section 1962(c).

The relevant portion of RICO, 18 U.S.C. § 1962(c), makes it illegal for "any person ... associated with any enterprise ..., to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...." In this case, a fundamental issue is whether the alleged involvement of the Defendants in a series of alleged acts of racketeering against abortion facilities enables them to conduct a distinct association known as an "enterprise." We think not, principally because neither the association nor the racketeering is connected sufficiently to the personal economic gain of the Defendants.

There is little dispute that RICO was a result of concerns by Congress with "the economic power of organized crime derived from its huge illegal profits." *Russello v. United States*, 464 U.S. 16, 29 (1983). To do so, RICO provided explicitly for criminal and civil penalties as well as forfeiture of interests in an "enterprise." Such forfeitures protected legitimate business from infiltration with the proceeds of racketeering activity. *See id.* citing *United States v. Turkette*, 452 U.S. 576, 591 (1981) ("The broader goal was to remove the profit from organized crime by separating the racketeer from *his* dishonest gains.") (emphasis added).

Similarly, there is little debate over whether Defendants possess the economic power of the organized crime that in-

spired RICO and over whether the Defendants' association was formed to enrich them materially. None of the behavior alleged in the Second Amended Complaint, as ugly as it may appear to be, even implies that Defendants are seeking personal economic gain.

The only economic gain of the Defendants alleged in the Complaint results from the independent, unpredictable acts of third parties. It is not, in any cognizable legal sense, the result of racketeering. It is at least as much the result of media activity. As noted by the Seventh Circuit in its decision to dismiss this portion of the Complaint, viewed most favorably to the Plaintiffs,

> The cause and effect claim ... is something like this: defendants invade health centers, destroying property and injuring center staff; media covers event; potential contributors see media coverage and are favorably impressed; contributor sends donation; defendants receive income.

968 F.2d at 625.

There is not the first hint in the text of RICO that an "enterprise" is something that results from media coverage, or from the voluntary contributions of third parties to persons who are otherwise criminals. There are simply too many possible causes of contributions, separate and distinct from any admiration for racketeering against abortion facilities, to enable this Court to credit an allegation that Defendants' misconduct amounts to "participation" in an "enterprise."

This Court's "continuity" requirement, used to identify the "pattern of racketeering activity" described in Section 1962(c), further implies that no enterprise is conducted by the racketeering itself. In order to engage in a "pattern of racketeering activity," relatedness is not enough. "[I]t must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J., Inc., v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240 (1989) (emphasis in original). Absent a direct relation to economic enrichment arising out of the criminal misconduct, there is not a sufficient threat of con-

tinuing activity to imply control of an "enterprise" thereby. In other words, absent personal economic enrichment or enrichment of the enterprise *from* racketeering, the criminal does not "participate" in the "enterprise *through* a pattern." He cannot afford to.

Absent other evidence of personal economic gain from the "pattern" itself, even the announced intention to continue criminal behavior against abortion facilities should fail to violate Section 1362(c). Public debate on the subject of abortion is so intense that a public expression of an intention to stop abortion is hardly evidence of the "continuity" needed to conduct a RICO "enterprise."

In sum, the pattern of racketeering activity needed to conduct an enterprise under Section 1962(c) is absent where there is no allegation of personal economic gain.

A. The structure of RICO's prohibitions makes it likely that the economic gain alleged here is not intended by Congress to be within the ambit of the statute.

Section 1962(c) is the third of four prohibition subparagraphs. The first two relate "enterprise" to a "pattern of racketeering activity" in explicitly economic terms. Thus, subparagraph (a) makes it unlawful to "invest" or "use" the proceeds of racketeering in an enterprise. Subparagraph (b) bars the acquisition of "any interest" in an enterprise through racketeering. The ordinary meaning of these terms refers to property, an economic concept. *See Russello v. United States*, 464 U.S. 16, 21 (1983) (defining "interest").

Moreover, these economic concepts refer to the proceeds of racketeering activity. *See Russello v. United States*, 464 U.S. at 21. These subparagraphs plainly imply that an "enterprise" is an activity involving money available for distribution to participants. The "racketeering activity" listed in 18 U.S.C. § 1961 also generally constitutes crimes that themselves create money.

Subparagraph (c) seems to go another step beyond (a) and (b), although nothing in the text suggests an intent to

abandon the economic motive implicit in the enterprise. It reaches persons "employed by or associated with any enterprise" or who "participate ... in the conduct of the enterprise's affairs through" racketeering.

B. Petitioners underlying alleged RICO predicate offense — extortion — is not the kind which is actionable when there is economic gain derived from unrelated third party contributors.

Even if RICO could be construed to reach as far as Petitioners propose, the underlying racketeering offense in this case — extortion[2] — is not likely to be the kind of RICO offense that does generate economic gain for the defendant. Extortion *itself* must create personal economic gain for the wrongdoer. It is not enough that someone else may contribute voluntarily to the wrongdoer. As Justice Stevens wrote, in noting common ground for this Court in a recent case construing the extortion statute:

> [I]t is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver....

McCormick v. United States, 111 S.Ct. 1807, 1821 (1991) (Stevens, J., dissenting) (distinguishing campaign contribution from storekeeper payment to thugs). In the context of illegal anti-abortion activity, there is no hint that the abortion clinic victims can achieve or have achieved relief by some understanding to provide property to the rescue organizers. As noted previously, any economic gains generated in connection with the extortion are the results of independent acts of third parties.

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[2] (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C. § 1951(b)(2).

In other words, Petitioner's Second Amended Complaint involves neither extortion, nor the proceeds from extortion flowing into an enterprise. For this reason, the Petitioners have not alleged facts that show employment or association with an enterprise *through* extortion. And similarly, they have not alleged employment or association through any defined racketeering activity.

In summary, the text of RICO was not likely intended to reach the type of misbehavior alleged in the Second Amended Complaint.

II. As A Principle Of Statutory Construction, The Term "Enterprise" Should Not Be Deemed To Reach Noncommercial Associations, Because It Would Raise Serious Doubt As To RICO's Constitutionality Under This Court's First Amendment, Overbreadth, and Vagueness Rulings.

Under this Court's previous First Amendment precedent, ordinary citizens do not risk "guilt by association" when they associate with those who advocate social or political change by unconventional or even unlawful means. Petitioners invite this Court to explode the constitutional and common-sense boundaries of RICO's "enterprises" and "associations", thereby leveling the First Amendment walls protecting all social protesters from the chilling winds of enforced orthodoxy.[3]

Amici urge this Court to decline this invitation, which would otherwise raise serious doubts as to the validity of RICO under any of three well-established doctrines. First, free speech protection extends to expression intended to in-

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[3]The fact that Plaintiffs seek a remedy in damages does not vitiate these concerns. This Court has long recognized in other contexts as well that such relief can be at odds with the aspirations embodied in the First Amendment, however distasteful the speech. *See Falwell v. Hustler Magazine, Inc.*, 485 U.S. 46 (1988) (reversing damage award). Plainly, well-intentioned rules of liability can be misused to punish people for their support of social protest, including civil disobedience. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamation law).

fluence and even coerce a change in the targeted conduct, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Moreover, First Amendment overbreadth doctrine prohibits punishment of speech about crime. *Simon & Schuster*, 112 S.Ct. 501 (1991). Finally, this Court's vagueness concerns with RICO[4] would become frightening reality, as ordinary citizens would not be able to foresee where a jury, bereft of standards, would draw the line between protected versus culpable "associations".

1. Offensive language or rhetoric designed to deter business patrons retains its First Amendment protection where it centers on a matter of public concern.

The *Claiborne Hardware* decision merits full discussion as a standard by which to measure Defendant's connection with any peripheral non-peaceful conduct. It involved a boycott that began at the First Baptist Church of Port Gibson, Mississippi in April 1966 where NAACP's field secretary Charles Evers advised a group of "assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people." 458 U.S. at 900 n.28. Thereafter, in the next nine months, in ten incidents "an unlawful form of discipline was applied to certain boycott violators." *Id.* at 905.

The unlawful conduct included shots being fired into a home, bricks thrown through car windows, an NAACP member taking a bottle of whiskey from a black man who purchased it from a white-owned store, a fight involving theft of a gun, a public "spanking" of an elderly brick mason, slashing of tires, damage to a flower garden, and some threatening phone calls. *See id.* at 904-06. In addition, persons trading

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[4] At least four members of this Court have acknowledged vagueness concerns with RICO. *See H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws").

with white merchants were called demeaning names, branded as "traitors" and socially ostracized. *Id.* at 904.

In April 1969, Evers again spoke at the First Baptist Church after a young black male had been killed by Port Gibson police. He threatened "discipline" of boycott violators. Two days later, Evers told several hundred people: "If we catch any of you going in any of them racist stores, we're going to break your damn neck." *Id.* at 902.

Suit was filed in October 1969, and in 1976, liability was found on three separate conspiracy theories: malicious interference with business, violating State antitrust statutes, and statutes against secondary boycotts. Damages were imposed against 130 defendants jointly and severally, including the national NAACP. An injunction was issued as well against "store watching," discouraging patronage of stores, especially by using demeaning or obscene language, and against picketing or patrolling any premises. *See id.* at 891-94.

The Mississippi Supreme Court upheld the judgment on interference with business grounds, and noted defendants had "agreed to use force, violence, and threats against the peace to effectuate the boycott." *Id.* at 895. The United States Supreme Court reversed, and criticized the State court for not making sufficiently precise findings.

The effort to cause economic damage to white merchants by boycott was deemed protected by the First Amendment:

> In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." *Thomas v. Collins, supra,* at 530, 65 S.Ct. at 322. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition — rather than through riot or revolution — petitioners sought change to social order that consistently treated them as second-class citizens.

Id. at 911-12. The boycott did not lose its protection despite efforts to "embarrass others or coerce them into action" by

reading their names at church meetings and publishing them in a newspaper.[5]

The difficult part of the case was in separating the damage caused by violent conduct from that caused by non-violent conduct. The Court stated its analysis by noting: "The First Amendment . . . restricts the ability of the State to impose liability on an *individual solely because of his association with another.*" *Id.* at 918 (emphasis added). "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." *Id.* at 920.

Among the issues of particular concern to the Court was the finding of liability against those with "[r]egular attendance and participation at the Tuesday meetings of the Claiborne Branch of the NAACP" at the First Baptist Church. *Id.* at 924, 897. The Mississippi Supreme Court did not sustain liability "on a theory that state law prohibited a nonviolent politically motivated boycott," but instead because of the violence surrounding the boycott. *Id.* at 915. And, with respect to those meetings, "there were statements saying you would be dealt with if found trading in boycotted stores," and suggestions that the Sheriff would be busy responding to calls of victims. *Id.* at 925 n.68.

Liability for this church attendance was impermissible "guilt *for* association." The Court wrote:

> [c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those *acts of violence* were "agents" or "servants" of those who attended the NAACP meetings; certainly such a relationship cannot be found simply because both shared certain goals.

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[5] Moreover, because the boycotters were not themselves motivated by economic ends, State tort law power to regulate economic activity did not justify a finding of damage liability or injunctive relief. *See id.* at 914-15.

458 U.S. at 925, n.69. Thus, there was no evidence that "any illegal conduct was authorized, ratified, or even discussed at any of the meetings." *Id.* at 924.

As for the persons who enforced the boycott by watching stores, the same principle applied. "There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." *Id.* at 926.

Even Evers, whose passionate rhetoric drew the participants in the boycott together, and who "threatened" groups meeting at the First Baptist Church, could not be held liable for business losses caused by his participation in the boycott. The Court remarked:

> While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

Id. at 928. The Court held the judgment against Evers could not be sustained because "there is no evidence — apart from the speeches themselves — that Evers authorized, ratified, or directly threatened acts of violence." *Id.* at 929 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1968)).

In sum, the First Amendment plainly limits Plaintiff's ability to claim that fear, intimidation, or coercion are illegitimate devices in a matter of great public concern:

> The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

> The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. *The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott.* A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees.

Id. at 933-34 (emphasis added). *Accord, Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988) (explaining *Claiborne*).

Any potential deterrent effect on store customers from legitimate protest activity or the peripheral violence and threats is insufficient to justify liability. This Court rejected arguments that picketing and store watching, coupled with sporadic violent acts, were coercive:

> . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider v. State, supra; Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Petitioners were engaged openly and vigor-

> ously in making the public aware of respondent's . . . practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

458 U.S. at 911 (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1972)).

If Petitioners' argument were correct, then the Constitution might not protect the NAACP from State tort or RICO claims by Mississippi merchants that the publicity of civil rights protests and violence injuring their businesses also contributed to NAACP's economic success. Surely, this is not correct.

Our democracy cannot afford to function in such a way. Its vibrancy depends on protection for organizations that wish to operate lawfully but challenge the legitimacy of popular institutions and conventions. As Justice Brennan urged in reviewing a statute prohibiting advocacy of violent overthrow of the government by persons who believe there should be no private property, such activity needs to be protected, not chilled. What was true then for the university, should also be true for direct citizen participation in matters of public concern through association with organized social protest movements.

> No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.
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> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405; "[f]or standards of permissible statu-

> tory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967).

Congress should not be deemed to have endorsed in RICO a chill on such organizations, either in racial protests or abortion protests. And, surely Congress did not mean in RICO to provide damage remedies against universities that received contributions for victims of student protest, urged on by revolutionary professors.

Yet, Plaintiffs seek to ground liability for "participation" in an enterprise "through" racketeering through mere receipt of money from third parties. As the argument goes, the alleged extortion results in economic gain to the enterprise, and sustains it.

Such an argument closely resembles a desire to prevent economic success for the organizations that are tolerant of, or even sympathetic to, the cause embodied in the illegal conduct. Our Constitution must tolerate such success, and must not allow a court complaint that claiming this kind of success is barred by the Congressional efforts in RICO to prevent illegally obtained money from finding its way to lawful activity.

2. Petitioners' use of RICO to punish speech about crime even though the crime is not engaged in for profit, is itself an overbroad use of RICO.

In *Simon & Schuster v. New York Crime Victims Board*, 112 S.Ct. 501 (1991), this Court struck down a law that required escrow of the proceeds of books by criminals about their crimes. The Court's list of works that in over-inclusive fashion would be reached by such a law ranged from Rev. Jesse Jackson's writings about his arrest in 1963 for trespass in the racially segregated South to Henry Thoreau's own refusal to pay taxes, chronicled in his essay *Civil Disobedience*. *See* 112 S.Ct. at 511. In doing so, this Court acknowledged a compelling government interest in compensating victims of criminal

behavior. However, this interest did not save a law that, on its face, was not narrowly tailored because the law reached works published without regard for whether they would generate profits for the criminal. *Id.*

Similarly the construction of RICO proposed by Petitioners would hold an enterprise responsible in damages to victims of racketeering without regard for whether their protests that create fear or apprehension are also designed to generate economic gain for the participants. As with the historic works described in *Simon v. Schuster*, much written work or speech about civil disobedience from the anti-abortion perspective is written, and much speech is uttered, with no motive to profit for crime.

A fortiori, Respondents here should not be required under RICO's civil damage remedy to disgorge anything given them by third parties because they, or someone else in the media, has written about their crime.

III. The Deeply Divisive Abortion Debate Is A Particularly Bad Context In Which To Conclude That RICO Reaches Racketeering Activity Not Causing Economic Gain.

Anti-abortion activism is probably known for its certitude about the incorrectness of one of this Court's seminal decisions. This case presents a potential opportunity for adversaries of the anti-abortion movement to crush this certitude into insignificance. However, the temptation to seek to crush is just the impulse this Court is equipped to resist. Overruling the court below would affect far more that the fate of anti-abortion activity. The future of social protest movements generally, and particularly of social protest movements that oppose activities conducted for profit, are at stake. This case threatens to engulf such movements in a tidal wave of RICO litigation and thereby chill the exercise of First Amendment rights.

Political scientists have noted that:

> In the past decade, most Western democracies have experienced a flowering of citizen action

> groups and social movements concerned with environmentalism, women's rights, peace, consumerism, life-style choices, and other issues of advanced industrial societies. These groups have attempted to mobilize the public's changing values and issue interests into a new political force that can challenge governments and the dominate social paradigm. Through . . . their reliance on new forms of protest and direct citizen action, these groups have disrupted the political status quo in an effort to expand the normal boundaries of democratic politics.

The Annals of the American Academy of Political and Social Science, *Citizens, Protest, and Democracy* 8 (ed. Russell J. Dalton July 1993) (preface).

The social protest movements that come within this pattern noted by political scientists, and which are intrinsically hostile to various for-profit activities, include the animal rights movement, the anti-nuclear energy movement, and the environmental movement. Segments of the animal rights movement seek to destroy, reduce, or regulate certain economic activities, including hunting, whaling, the fur industry, the meat industry, and animal experimentation. The anti-nuclear energy movement seeks to destroy the nuclear energy industry. Segments of the environmental movement have sought to destroy or limit certain industries that claim to dispose of or process various forms of hazardous waste, apparently on the theory that the destroying of these industries would lead to a reduction in production of such wastes. The environmental movement has also been broadly hostile to other industries, such as the lumber industry in the American Northwest.

Other social movements often target economic activity as an indirect means of forcing unrelated action they seek. Gay rights boycotts of Colorado or the NOW's boycott of states failing to ratify the equal rights amendment have attempted to use the threat or reality of economic loss to affect unrelated non-economic activities. Historically, the same can be said for the boycott movement employed by civil rights activists in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

The theory of Petitioners is apparently that social-protest activities that cause an economic deprivation are actionable under RICO. As the amicus brief submitted on the behalf of the American Civil Liberties Union (ACLU) notes, this claim raises a number of First Amendment issues. The "civil liberties risks" to which the ACLU refers, however, are not eliminated by the concept that the First Amendment does not protect "illegal" conduct. As the body of this brief demonstrates, the First Amendment issues posed by this case cannot be resolved by resort to a legal/illegal distinction, because the First Amendment necessarily limits which sorts of speech, association, and expressive conduct may be made illegal.

This Court's precedents also demonstrate that a violent/nonviolent distinction, although helpful, must be further refined. *See Claiborne Hardware, supra,* and *Brandenburg v. Ohio,* 395 U.S. 444 (1969). While the First Amendment does not protect actual violent acts against persons, the First Amendment has been held to protect intimations and threats of violence in the context of overcharged political rhetoric. Thus, the Court's protection of the hate-filled rhetoric of the Ku Klux Klan, an organization clearly involved in true violence, and the Court's refusal to predicate liability based on Charles Evers bluntly threatening remarks indicate that even a "violence" standard must be understood within the context of this Court's protection of offensive, and even frightening speech. *See also, R.A.V. v. City of St. Paul,* 112 S.Ct. 2538 (1992).

The actual violence committed by anti-abortion activists, including shooting abortionists and firebombing clinics, can be and has been vigorously prosecuted by state and federal authorities. No claim has been made, or could be made, that state authorities have failed to vigorously investigate and prosecute the two recent shootings of abortionists. State law, of course, generally provides for complicity and conspiracy criminal liability. Clinic bombings, and complicity and conspiracy in relation to such bombings, is clearly actionable under 18 U.S.C. § 844(i), in combination with 18 U.S.C. §§ 2, 371. Such prosecutions, of course, would have to honor the

teaching of *Claiborne Hardware, supra*, that mere association is not equivalent to guilt. However, to the extent that national or local conspiracies involving true intent to facilitate the commission of such violent acts exists, then existing federal and state laws are adequate.

The use of RICO to punish broadly all protest activities that create an economic deprivation plainly would result in the RICO-ization of contemporary protest movements. Economic actors — ranging from logging companies to Procter & Gamble[6] — which are negatively affected by protest activities, would likely seek treble damages as a way of shutting down such protest movements. In many such instances the affected industry's profit-making activities would produce an ample litigation fund that could overwhelm the financial and legal capacities of various social protest movements. In such an atmosphere, the very threat or instigation of a suit, even without victory, could cause millions of Americans to shy away from the form of direct-democracy now represented by such movements. If this Court allows the use of RICO to destroy the anti-abortion movement, it will also threaten a host of other social protest movements

It strains belief, as well as established rules of statutory construction, to conclude that the people's representatives in Congress intended this Statute to have such possible effects on social protest movements, much less the counter-cultural abortion reform movement active in the years preceding RICO's enactment. If that is indeed the wish of the Congress, then it should be expressed directly, and not in a way that passes responsibility to this Court, as a matter of statutory construction.

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[6] *Cf.* Julie Fields, *Animal-Rights Activists Hold Protest At Plant*, L.A. Times, Aug. 31, 1993, at B2, col. 2 (animal rights protesters demonstrated at Procter & Gamble plant, urging consumer ban on company due to company's use of animals in product testing).

CONCLUSION

These *amici* urge the Court to affirm the decision by the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Statement of Interest

The Southern Center for Law & Ethics is a non-profit publicly-funded, tax exempt corporation founded in January 1985 and based in Birmingham, Alabama. Policies are set by a board of directors consisting of three attorneys and six lay persons. The Center provides legal counsel and files *amicus curiae* briefs on a variety of issues, ranging from the free speech rights of college professors to the legal status of midwives and home schoolers. The Center has been particularly active, through litigation and scholarship, in seeking to develop and promote an understanding of the constitutional right of privacy that does not include the right to abortion. *Amicus* briefs were submitted previously to this Court in three cases, and two of those briefs, submitted in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), focused on civil disobedience in the debate over abortion.

The Christian Legal Society, founded in 1961, is a non-profit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law & Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise. The Center has filed briefs *amicus curiae* in virtually every church-state and religious expression case before this Court in the past decade.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence, 1 Stat. 1 (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of

which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's character, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Indeed, the Declaration states that citizens have a duty to rebel and establish anew government if this right (or any other inalienable right) is abridged by the State. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

J. Scott Houser is a graduate of Westminster Theological Seminary and an ordained minister in Birmingham, Alabama. He is a well-known figure locally in public affairs. His activities, under the auspices of the Southern Center for Law & Ethics, include writing, public speaking, interaction with law students and members of the academic community, as well as counseling with practicing attorneys and engagement of lawyers as necessary on important public issues.

Houser is personally interested in this case because of pending litigation in which he is a party, and which demonstrates the potentially broad reach of RICO. The litigation began over two years after he had concluded that rescue activity was no longer appropriate. Houser's change of position is discussed in the findings of *Lucero v. Operation Rescue*, 772 F. Supp. 1193, 1197 (N.D. Ala. 1991), *aff'd*, 954 F.2d 624 (11th Cir. 1992). In July 1989, after this Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and opportunities for valid pro-life regulatory legislation seemed available, Houser formally abandoned rescue activity. Almost two years later, the owner of an abortion facility where